

ORIGINAL

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FILED

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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY DEPUTY

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11
12
13 A. J. OLIVER,

14 Plaintiff,

15 vs.

16 THE PEP BOYS MANNY MOE &
17 JACK of CALIFORNIA dba PEP
18 BOYS #651; ROBERT SARKIS
19 LION,

20 Defendants.

No.

Plaintiff's Complaint

'08 CV 1472 BEN POR

I. SUMMARY

1. This is a civil rights action by plaintiff A. J. Oliver ("Oliver") for discrimination at the building, structure, facility, complex, property, land, development, and/or surrounding business complex known as:

Pep Boys #651
454 Broadway
Chula Vista, CA 91910
(hereafter "the Store")

2. Oliver seeks damages, injunctive and declaratory relief, attorney fees and costs, against The Pep Boys Manny Moe & Jack of California dba Pep Boys #651 and Robert Sarkis Lion (collectively "Pep Boys") pursuant to the Americans with Disabilities Act of 1990, (42 U.S.C. §§ 12101 et seq.), and related California statutes.

II. JURISDICTION

3. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343 for ADA claims.

4. Supplemental jurisdiction for claims brought under parallel California law—arising from the same nucleus of operative facts—is predicated on 28 U.S.C. § 1367.

5. Oliver's claims are authorized by 28 U.S.C. §§ 2201 and 2202.

III. VENUE

6. All actions complained of herein take place within the jurisdiction of the United States District Court, Southern District of California, and venue is invoked pursuant to 28 U.S.C. § 1391(b), (c).

IV. PARTIES

7. Pep Boys owns, operates, and/or leases the Store, and consists of a person (or persons), firm, and/or corporation.

- 1 • The counters in the parts area are too high and do not have a portion
- 2 lowered to accommodate patrons in wheelchairs;
- 3 • The signage at the entrance to the men's restroom is not correct;
- 4 • The entrance door to the men's restroom requires twisting;
- 5 • The drinking fountain is too high;
- 6 • The pipes underneath the lavatory are not wrapped;
- 7 • There is insufficient clear floor space between the water closet and the
- 8 lavatory;
- 9 • The grab bars do not extend 24 inches from the front of the water closet;
- 10 and,
- 11 • The operable part of the paper towel dispenser is mounted more than 40
- 12 inches from the floor.

13 These barriers prevented Oliver from enjoying full and equal access.

14 11. Oliver was also deterred from visiting the Store because he knew
15 that the Store's goods, services, facilities, privileges, advantages, and
16 accommodations were unavailable to physically disabled patrons (such as
17 himself). He continues to be deterred from visiting the Store because of the
18 future threats of injury created by these barriers.

19 12. Oliver also encountered barriers at the Store, which violate state and
20 federal law, but were unrelated to his disability. Nothing within this complaint,
21 however, should be construed as an allegation that Oliver is seeking to remove
22 barriers unrelated to his disability.

23 13. Pep Boys knew that these elements and areas of the Store were
24 inaccessible, violate state and federal law, and interfere with (or deny) access to
25 the physically disabled. Moreover, Pep Boys has the financial resources to
26 remove these barriers from the Store (without much difficulty or expense), and
27 make the Store accessible to the physically disabled. To date, however, Pep
28

Boys refuses to either remove those barriers or seek an unreasonable hardship exemption to excuse non-compliance.

14. At all relevant times, Pep Boys has possessed and enjoyed sufficient control and authority to modify the Store to remove impediments to wheelchair access and to comply with the Americans with Disabilities Act Accessibility Guidelines and Title 24 regulations. Pep Boys has not removed such impediments and has not modified the Store to conform to accessibility standards. Pep Boys has intentionally maintained the Store in its current condition and has intentionally refrained from altering the Store so that it complies with the accessibility standards.

15. Oliver further alleges that the (continued) presence of barriers at the Store is so obvious as to establish Pep Boys' discriminatory intent.¹ On information and belief, Oliver avers that evidence of this discriminatory intent includes Pep Boys' refusal to adhere to relevant building standards; disregard for the building plans and permits issued for the Store; conscientious decision to the architectural layout (as it currently exists) at the Store; decision not to remove barriers from the Store; and allowance that the Store continues to exist in its non-compliant state. Oliver further alleges, on information and belief, that Pep Boys is not in the midst of a remodel, and that the barriers present at the Store are not isolated (or temporary) interruptions in access due to maintenance or repairs.²

VI. FIRST CLAIM

Americans with Disabilities Act of 1990

Denial of "Full and Equal" Enjoyment and Use

16. Oliver incorporates the allegations contained in paragraphs 1 through 15 for this claim.

¹ E.g., *Gunther v. Lin*, 144 Cal.App.4th 223, fn. 6

² Id.; 28 C.F.R. § 36.211(b)

1 17. Title III of the ADA holds as a “general rule” that no individual
2 shall be discriminated against on the basis of disability in the full and equal
3 enjoyment (or use) of goods, services, facilities, privileges, and accommodations
4 offered by any person who owns, operates, or leases a place of public
5 accommodation. 42 U.S.C. § 12182(a).

6 18. Pep Boys discriminated against Oliver by denying “full and equal
7 enjoyment” and use of the goods, services, facilities, privileges or
8 accommodations of the Store during each visit and each incident of deterrence.

9 Failure to Remove Architectural Barriers in an Existing Facility

10 19. The ADA specifically prohibits failing to remove architectural
11 barriers, which are structural in nature, in existing facilities where such removal
12 is readily achievable. 42 U.S.C. § 12182(b)(2)(A)(iv). The term “readily
13 achievable” is defined as “easily accomplishable and able to be carried out
14 without much difficulty or expense.” *Id.* § 12181(9).

15 20. When an entity can demonstrate that removal of a barrier is not
16 readily achievable, a failure to make goods, services, facilities, or
17 accommodations available through alternative methods is also specifically
18 prohibited if these methods are readily achievable. *Id.* § 12182(b)(2)(A)(v).

19 21. Here, Oliver alleges that Pep Boys can easily remove the
20 architectural barriers at the Store without much difficulty or expense, and that
21 Pep Boys violated the ADA by failing to remove those barriers, when it was
22 readily achievable to do so.

23 22. In the alternative, if it was not “readily achievable” for Pep Boys to
24 remove the Store’s barriers, then Pep Boys violated the ADA by failing to make
25 the required services available through alternative methods, which are readily
26 achievable.

1 Failure to Design and Construct an Accessible Facility

2 23. On information and belief, the Store was designed or constructed (or
3 both) after January 26, 1992—independently triggering access requirements
4 under Title III of the ADA.

5 24. The ADA also prohibits designing and constructing facilities for
6 first occupancy after January 26, 1993, that aren't readily accessible to, and
7 usable by, individuals with disabilities when it was structurally practicable to do
8 so. 42 U.S.C. § 12183(a)(1).

9 25. Here, Pep Boys violated the ADA by designing or constructing (or
10 both) the Store in a manner that was not readily accessible to the physically
11 disabled public—including Oliver—when it was structurally practical to do so.³

12 Failure to Make an Altered Facility Accessible

13 26. On information and belief, the Store was modified after January 26,
14 1992, independently triggering access requirements under the ADA.

15 27. The ADA also requires that facilities altered in a manner that affects
16 (or could affect) its usability must be made readily accessible to individuals with
17 disabilities to the maximum extent feasible. 42 U.S.C. § 12183(a)(2). Altering
18 an area that contains a facility's primary function also requires adding making
19 the paths of travel, bathrooms, telephones, and drinking fountains serving that
20 area accessible to the maximum extent feasible. *Id.*

21 28. Here, Pep Boys altered the Store in a manner that violated the ADA
22 and was not readily accessible to the physically disabled public—including
23 Oliver—to the maximum extent feasible.

24 Failure to Modify Existing Policies and Procedures

25 29. The ADA also requires reasonable modifications in policies,
26 practices, or procedures, when necessary to afford such goods, services,
27

28 ³ Nothing within this Complaint should be construed as an allegation that plaintiff is bringing this action as a private attorney general under either state or federal statutes.

1 facilities, or accommodations to individuals with disabilities, unless the entity
2 can demonstrate that making such modifications would fundamentally alter their
3 nature. 42 U.S.C. § 12182(b)(2)(A)(ii).

4 30. Here, Pep Boys violated the ADA by failing to make reasonable
5 modifications in policies, practices, or procedures at the Store, when these
6 modifications were necessary to afford (and would not fundamentally alter the
7 nature of) these goods, services, facilities, or accommodations.

8 31. Oliver seeks all relief available under the ADA (*i.e.*, injunctive
9 relief, attorney fees, costs, legal expense) for these aforementioned violations. 42
10 U.S.C. § 12205.

11 32. Oliver also seeks a finding from this Court (*i.e.*, declaratory relief)
12 that Pep Boys violated the ADA in order to pursue damages under California's
13 Unruh Civil Rights Act or Disabled Persons Act.

14 VII. SECOND CLAIM

15 **Disabled Persons Act**

16 33. Oliver incorporates the allegations contained in paragraphs 1
17 through 30 for this claim.

18 34. California Civil Code § 54 states, in part, that: Individuals with
19 disabilities have the same right as the general public to the full and free use of
20 the streets, sidewalks, walkways, public buildings and facilities, and other public
21 places.

22 35. California Civil Code § 54.1 also states, in part, that: Individuals
23 with disabilities shall be entitled to full and equal access to accommodations,
24 facilities, telephone facilities, places of public accommodation, and other places
25 to which the general public is invited.

26 36. Both sections specifically incorporate (by reference) an individual's
27 rights under the ADA. See Civil Code §§ 54(c) and 54.1(d).

37. Here, Pep Boys discriminated against the physically disabled public—including Oliver—by denying them full and equal access to the Store. Pep Boys also violated Oliver’s rights under the ADA, and, therefore, infringed upon or violated (or both) Oliver’s rights under the Disabled Persons Act.

38. For each offense of the Disabled Persons Act, Oliver seeks actual damages (both general and special damages), statutory minimum damages of one thousand dollars (\$1,000), declaratory relief, and any other remedy available under California Civil Code § 54.3.

39. He also seeks to enjoin Pep Boys from violating the Disabled Persons Act (and ADA) under California Civil Code § 55, and to recover reasonable attorneys' fees and incurred under California Civil Code §§ 54.3 and 55.

VIII. THIRD CLAIM

Unruh Civil Rights Act

40. Oliver incorporates the allegations contained in paragraphs 1 through 30 for this claim.

41. California Civil Code § 51 states, in part, that: All persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

42. California Civil Code § 51.5 also states, in part, that: No business establishment of any kind whatsoever shall discriminate against any person in this state because of the disability of the person.

43. California Civil Code § 51(f) specifically incorporates (by reference) an individual's rights under the ADA into the Unruh Act.

44. Pep Boys' aforementioned acts and omissions denied the physically disabled public—including Oliver—full and equal accommodations, advantages,

1 facilities, privileges and services in a business establishment (because of their
2 physical disability).

3 45. These acts and omissions (including the ones that violate the ADA)
4 denied, aided or incited a denial, or discriminated against Oliver by violating the
5 Unruh Act.

6 46. Oliver was damaged by Pep Boys' wrongful conduct, and seeks
7 statutory minimum damages of four thousand dollars (\$4,000) for each offense.

8 47. Oliver also seeks to enjoin Pep Boys from violating the Unruh Act
9 (and ADA), and recover reasonable attorneys' fees and costs incurred under
10 California Civil Code § 52(a).

11 IX. FOURTH CLAIM

12 Denial of Full and Equal Access to Public Facilities

13 48. Oliver incorporates the allegations contained in paragraphs 1
14 through 13 for this claim.

15 49. Health and Safety Code § 19955(a) states, in part, that: California
16 public accommodations or facilities (built with private funds) shall adhere to the
17 provisions of Government Code § 4450.

18 50. Health and Safety Code § 19959 states, in part, that: Every existing
19 (non-exempt) public accommodation constructed prior to July 1, 1970, which is
20 altered or structurally repaired, is required to comply with this chapter.

21 51. Oliver alleges the Store is a public accommodation constructed,
22 altered, or repaired in a manner that violates Part 5.5 of the Health and Safety
23 Code or Government Code § 4450 (or both), and that the Store was not exempt
24 under Health and Safety Code § 19956.

25 52. Pep Boys' non-compliance with these requirements at the Store
26 aggrieved (or potentially aggrieved) Oliver and other persons with physical
27 disabilities. Accordingly, he seeks injunctive relief and attorney fees pursuant to
28 Health and Safety Code § 19953.

X. PRAYER FOR RELIEF

WHEREFORE, Oliver prays judgment against Pep Boys for:

1. Injunctive relief, preventive relief, or any other relief the Court deems proper.
2. Declaratory relief that Pep Boys violated the ADA for the purposes of Unruh Act or Disabled Persons Act damages.
3. Statutory minimum damages under either sections 52(a) or 54.3(a) of the California Civil Code (but not both) according to proof.
4. Attorneys' fees, litigation expenses, and costs of suit.⁴
5. Interest at the legal rate from the date of the filing of this action.

DATED: August 12, 2008

DISABLED ADVOCACY GROUP, APLC



LYNN HUBBARD, III
Attorney for Plaintiff A.J. Oliver

⁴ This includes attorneys' fees under California Code of Civil Procedure § 1021.5.
Oliver v. The Pep Boys Manny Moe & Jack of California, et al.
Plaintiff's Complaint

CIVIL COVER SHEET

JS-44 (Rev. 12/07)

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

A.J. Oliver

(b) County of Residence of First Listed Plaintiff SAN DIEGO
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

LYNN HUBBARD, III DISABLED ADVOCACY GROUP, APLC
12 Williamsburg Lane Chico, CA 95926 (530) 895-3252

DEFENDANTS

The Pep Boys M&M & Associates dba Pep Boys #651; Robert Sarkis Lion

County of Residence of Plaintiff's Defendant SAN DIEGO
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

U8 CV 1472 BEN POR

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881		<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 650 Airline Regs.	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 660 Occupational Safety/Health		<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 355 Motor Vehicle Product Liability		<input type="checkbox"/> 690 Other	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 360 Other Personal Injury			<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 190 Other Contract				<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 850 Securities/Commodities/Exchange
<input type="checkbox"/> 195 Contract Product Liability				<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 196 Franchise				<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 890 Other Statutory Actions
					<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 892 Economic Stabilization Act
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 530 General	<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act		<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 740 Railway Labor Act		<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 790 Other Labor Litigation		<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 290 All Other Real Property	<input checked="" type="checkbox"/> 446 Amer. w/Disabilities - Other	<input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act		<input type="checkbox"/> 950 Constitutionality of State Statutes
	<input type="checkbox"/> 440 Other Civil Rights				

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

42 U.S.C. Section 12101, et seq.
Brief description of cause:
Ongoing violations of the ADA Construction Standards

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

08/12/2008

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

153968

AMOUNT

\$350

APPLYING IFP

JUDGE

MAG. JUDGE

GAC

8/13/08

**UNITED STATES
DISTRICT COURT**
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

153968 - TC

August 13, 2008
11:01:41

Civ Fil Non-Pris

USAO #.: 08CV1472

Judge.: ROGER T BENITEZ

Amount.:

\$350.00 CC

Total-> \$350.00

FROM: A.J. OLIVER
VS.
PEP BOYS